

EXHIBIT A

(2 of 2)

1 standard of conduct but it doesn't necessarily incorporate
2 federal issues about when civil recoveries will be permitted
3 for violations of that particular federal standard.

4 For example, if we were to switch into another
5 area, it is fairly common for plaintiffs in state lawsuits to
6 pursue, let's see, Consumer Fraud Act claims predicated upon
7 violations of FTC standards, and the complaint says this
8 conduct was deceptive because the defendant did this, this,
9 this and this, and the FTC says that this is a deceptive
10 practice. And if I recall correctly, New Jersey state law
11 stands for the proposition that if you violated FTC
12 standards, you've pretty much violated the New Jersey
13 Consumer Fraud Act. Those FTC standards generally have no
14 private right of action whatsoever. Correct?

15 MR. KRAMER: I take it as correct, your Honor.

16 THE COURT: All right.

17 MR. KRAMER: Your Honor, let me address it this way.
18 I understand the point.

19 THE COURT: In short, one can import a federal
20 standard without it being a federal issue as to whether or
21 not the remedial provisions of that statute are being adopted
22 by the state courts and it's up to -- it's an interpretation
23 of the state RICO statute as to what remedial components
24 would be incorporated, wouldn't it?

25 MR. KRAMER: Your Honor, I don't think that's right

1 when it comes to predicate acts for state RICO claims. The
2 predicate act is a violation of various federal statutes.
3 And to sit here and pick and choose which elements of those
4 statutes are going to be relevant there --

5 THE COURT: But stop a second. The state RICO
6 statute involves a designation of certain state and federal
7 criminal statutes. The bulk of those criminal statutes have
8 no remedial provisions. There is no remedial provision for a
9 violation of the state crime of theft which I presume is a
10 RICO predicate.

11 MR. KRAMER: And Grable says that doesn't matter
12 when it comes to removal. Grable says that specifically,
13 that doesn't matter that there's no remedial --

14 THE COURT: Understood. Okay. But the point is
15 that if you have a state statute which in fact is designed to
16 incorporate as a standard of conduct state and federal
17 criminal statutes for purposes of determining what conduct is
18 violative of the state statute, that does not mean that you
19 have also incorporated federal standards as to the
20 circumstances under which a recovery would be permitted for a
21 violation of those standards. And when I take a look at the
22 issues which you've raised here, your issues of loss
23 causation and detrimental reliance and so on are all issues
24 which focus on what remedy would be permitted, what damages
25 would be permitted if there was a finding of a violation of

1 this standard.

2 MR. KRAMER: Your Honor, they're all elements of a
3 cause of action under those statutes. They're all required
4 elements that plaintiffs must plead. And let me give you two
5 responses to this general -- it's a very interesting way to
6 look at it. Let me give two responses.

7 Number one, the New Jersey courts do say that they
8 would look to and interpret federal law if there's no state
9 law available, and no one here has cited to your Honor state
10 law, New Jersey state law on these issues.

11 And number two, what you're saying is essentially
12 saying that when you look at all of the cases, the removal
13 cases involving state RICO and federal predicate acts, not a
14 single one of those cases adopts this analysis. Instead,
15 every one of those cases, and I can list them for your Honor,
16 every one of those cases goes through the analysis that I
17 presented, which is looking at the elements of the federal
18 predicate claim and determining whether it raises a
19 significant issue.

20 THE COURT: Question.

21 MR. KRAMER: Yes. Now, they may all be wrong.

22 THE COURT: Do they go through the elements of the
23 federal predicate in terms of what constitutes a criminal
24 violation of the predicate?

25 MR. KRAMER: Well, let me go through a couple of

1 them and tell you what they do.

2 THE COURT: Let's take a look.

3 MR. KRAMER: Okay. In Graham, there the remand was
4 denied because the court looked at the claim and determined
5 that the violations of federal criminal law as to predicate
6 acts were not sufficiently substantial to confer federal
7 question jurisdiction, not because that issue was an issue
8 for state court or for state law.

9 The same thing in Meinders, the court took a look at
10 the Colorado RICO statement and said that the issues weren't
11 sufficiently substantial because the issues of federal law in
12 the case the defendant had already admitted violated. These
13 courts don't look at it and say this is an issue for the
14 state court. They don't look at it and say, oh, we can't
15 address this, we can't look at the federal issues raised in
16 the RICO predicates because it's a state law issue.

17 Instead, each one of these cases, Patterman is the
18 same, Bridgestone is the same, they actually analyzed the
19 federal predicate and decide whether there's a significant
20 issue raised or not.

21 THE COURT: The question I'm asking is not whether
22 they analyzed the federal predicate. Of course they have to
23 analyze the federal predicate, but the federal predicates are
24 by and large set forth by statute in criminal statutes and
25 there is no federal criminal statute which has as an element

1 of its violation loss causation.

2 MR. KRAMER: But your Honor, here one of the
3 predicates is civil securities fraud which does have that as
4 an element and it also has reliance as an element, and those
5 are issues that have been the subject of numerous Supreme
6 Court rulings that are very contested.

7 In fact, your Honor, there's sort of a parallel case
8 that was just reassigned to this Court and to you where
9 shareholders of Biovail are seeking to bring a state class
10 action. Their complaint is a carbon copy of this complaint
11 and your Honor will be addressing those issues, and I think
12 if you look at Grable, what Grable says is if there's a
13 significant federal issue, we want it to percolate up through
14 the federal courts. We want the law to develop that way, and
15 I think that holds true here and it holds true here doubly
16 because your Honor is going to be facing exactly these issues
17 in the securities class action and the notion that we're
18 going to have different courts, one federal and one state,
19 ruling on these very same issues is not the efficiency and
20 uniformity that underlies 1441 removal and is the basis of I
21 think Grable, the way Grable looked at this and said if it's
22 significant, we want a federal court to weigh in on it.

23 So, while you may be right about some of the
24 criminal predicates, I don't think that applies to the civil
25 securities cases.

1 THE COURT: Well, like for example, let's take loss
2 causation.

3 MR. KRAMER: Okay.

4 THE COURT: All right. There is no doubt that one
5 cannot recover a securities fraud case under 10(b)(5) without
6 establishing loss causation.

7 MR. KRAMER: Right.

8 THE COURT: But to the extent that that is a
9 function of stating a viable civil cause of action for
10 recovery, it's very significant for federal purposes.

11 MR. KRAMER: It's a significant federal issue.

12 THE COURT: However, our plaintiff here by
13 definition cannot recover under 10(b)(5).

14 MR. KRAMER: Well, the fact that the significant
15 issue is one they're destined to lose shouldn't mean that we
16 lose the federal forum over it.

17 THE COURT: The question ends up being then, there
18 is no recovery for this plaintiff as a non-purchaser, as I
19 recall --

20 MR. KRAMER: That's correct.

21 THE COURT: -- under 10(b)(5).

22 MR. KRAMER: That is correct.

23 THE COURT: There is no cause of action. It's
24 conceded there is no cause of action.

25 MR. KRAMER: They have no standing if they're not a

1 purchaser or seller of securities, that's correct.

2 THE COURT: Right. Okay. Now, the question then is
3 whether or not New Jersey would recognize them as being able
4 to pursue such a claim as a predicate for a RICO violation
5 without being one of those individuals who could ever pursue
6 a substantive claim for that.

7 MR. KRAMER: Your Honor, that's going to be the case
8 whenever you have a state RICO claim and the import of that
9 would be that state RICO claims are never removable under
10 1441. That is a point of view and a way of looking at the
11 world that I submit is different from how any court has ever
12 looked at it and fundamentally inconsistent in my view with
13 Grable.

14 So, I would urge the Court not to take that view
15 because it would then by definition say regardless of the
16 federal predicates, there can never be, with respect to those
17 predicates, a federal issue, and I don't think that's right,
18 your Honor. I don't think that's the right way to look at
19 it.

20 THE COURT: Let's take a look at Grable for a
21 second. Okay.

22 MR. KRAMER: Okay.

23 THE COURT: Grable in many ways is entirely
24 different from this case.

25 MR. KRAMER: Yes.

1 THE COURT: An adverse decision to the purchaser in
2 Grable had the potential for undermining the entire tax
3 foreclosure system of the Internal Revenue Service. Correct?

4 MR. KRAMER: I don't know that I'd go that far but
5 clearly the issue in Grable of whether the service had to be
6 personal or not was a significant issue for the IRS. I would
7 agree with that.

8 THE COURT: And its significance is, as I understand
9 it, the following. In short, IRS forecloses property and
10 collects its taxes by selling it.

11 MR. KRAMER: Correct.

12 THE COURT: If their judgments are going to be
13 routinely -- their foreclosure sales can routinely be
14 challenged in state court pursuant to state court
15 interpretations of federal law, there's the potential for the
16 entire marketability of tax foreclosed property being
17 imperiled. Correct?

18 MR. KRAMER: I think one could make that argument
19 that it's a very significant issue.

20 THE COURT: And in short, the only context, absent
21 removal jurisdiction under Grable, the only context where it
22 could have been determined would have been in state quiet
23 title actions. Correct?

24 MR. KRAMER: I don't know if that's true but that
25 sounds, you know -- I wouldn't contest that.

1 THE COURT: Put it this way, from the context of the
2 case it looks like it's the only way where it -- only place
3 it could have been determined, which is one of the reasons
4 why the court writ off the interpretation of Merrell Dow
5 saying if you don't have a cause of action, it can never be
6 removable.

7 MR. KRAMER: Grable I think was clearly correctly
8 decided. I mean, who am I to say.

9 THE COURT: I agree.

10 MR. KRAMER: But Grable --

11 THE COURT: Let's see, was Justice Alito on that
12 court? I don't remember.

13 MR. KRAMER: Yes, by then. But in any event, Grable
14 makes sense. But Grable, given the facts of Grable, the
15 court could have said, given those facts, removal will only
16 occur in the narrow circumstance where you have a single
17 dispositive federal issue of wide-ranging effect. They could
18 have come up with that rule based on those facts.

19 Your Honor, they didn't. What they said instead was
20 there's, quote, no single precise all-embracing test for
21 jurisdiction -- that's at 2368 -- and that the court must
22 apply, quote, a common sense accommodation of judgment to the
23 kaleidoscopic situations that present the federal issue.
24 That's 2367.

25 The facts of Grable could have supported a stricter

1 and narrower reading of 1441 jurisdiction but it didn't.
2 Instead, they said if it raises a substantial issue of
3 federal law and it's not inconsistent with the state-federal
4 division of labor, it's removable.

5 Now, not many cases are going to fall into that,
6 your Honor, but it isn't only the Grable cases that fall into
7 it. The court could have held that it didn't. So, we
8 believe this case does. We believe the issues are
9 substantial.

10 THE COURT: Okay. Let's quickly go to SLUSA.

11 MR. KRAMER: Should I move to SLUSA? Your Honor,
12 number one, the complaint in this action alleges market cap
13 diminution and damages. It just does. It's in the plain
14 language of the two paragraphs that I referred to earlier to
15 the Court, those being paragraphs 173 and 179 of the
16 complaint. It's in here. It seeks damages that only
17 shareholders can seek, companies can't seek them, and so,
18 what we're really left with here is the argument that this
19 can't be a covered class action, which is the only element of
20 SLUSA that's being challenged here.

21 It can't be a covered class action because by
22 definition, we're corporations and by definition,
23 corporations are only single people. There are only two
24 people here, that's not a class action. Well, your Honor,
25 there are a number of problems with that argument, the

1 principal one being that when you look at 15 U.S.C.
2 78(E)(B)(F)(5)(B), which is the definition of a covered class
3 action, it gives you three or four different definitions.
4 One of them is, quote, when one or more named parties, one or
5 more named parties, seek to recover damages on a
6 representative basis on behalf of themselves and other
7 unnamed parties similarly situated.

8 It doesn't matter that Biovail is a corporation and
9 in SLUSA Congress did not say it doesn't matter what actions
10 corporations bring, it could never be a covered class action.

11 Instead, what Congress said is that if one or more
12 parties seek to bring an action that is actually in a
13 representative basis for themselves and others, then it is a
14 covered class action, and the Third Circuit in Rowinski said
15 you have to interpret SLUSA broadly. And the Senate Banking
16 Committee said, and this is at S Rep number 105-182 at 8,
17 quote, SLUSA should be interpreted broadly to reach mass
18 actions and all other procedural devices that might be used
19 to circumvent the class action definition.

20 Your Honor, this case is such a case. This is a
21 case where a corporation has brought a lawsuit and has
22 alleged that it should be entitled to damages of the
23 diminution in its market cap, that's the loss or decline in
24 its stock price. It can't seek those damages. I think
25 that's why plaintiffs admit in their reply or try to back

1 away from it and say no, no, no, that's not what we meant,
2 that's not what we're doing. They clearly know they're not
3 entitled to it, only their shareholders are, and under one of
4 the definitions in SLUSA for a class action, the fact that a
5 corporation is a single entity simply doesn't matter.

6 And so, under SLUSA, given the way this complaint
7 is, under SLUSA it's a covered class action involving a
8 covered security making allegations of misrepresentations in
9 connection with their stock, and it is removable separate and
10 apart from whether 1441 provides for removal.

11 THE COURT: Thank you.

12 MR. KRAMER: Thank you, your Honor.

13 THE COURT: I will hear very briefly.

14 MR. KASOWITZ: That's all you'll need to hear, your
15 Honor. Just a couple of very quick points. With respect to
16 that last point, the complaint is very clear that it does not
17 seek to represent -- that the plaintiffs here don't seek to
18 represent anyone. It is not a representative complaint. And
19 although it's an imaginative argument by defendants to claim
20 that if there's some element of relief being sought for
21 market cap diminution and the like, then it must be a
22 representative case, it's not.

23 The remedy that defendants have here is to seek to
24 strike or dismiss that element of damages to the extent that
25 we are seeking to recover it, and which we're not. So,

1 that's just very clear. That doesn't bootstrap this case
2 into a class action under SLUSA. That's number one.

3 Number two, there is some law in the states for the
4 proposition, which we cite in our case, that under certain
5 circumstances a loss in market cap may be recoverable by a
6 company for itself in certain circumstances.

7 Secondly, the point that defendants have made about
8 Grable being -- that there's nothing since Grable that talks
9 about Grable is not correct. There's the Empire Health
10 Choice case recently decided by the Supreme Court of the
11 United States and we'd submit, your Honor, that what
12 defendants are trying to do here is to take the position that
13 Grable opens the door to arising under jurisdiction, that
14 it's opening the door to all sorts of cases that are not
15 entitled to be removed, and the Supreme Court following its
16 decision in Grable, in the Empire Health Choice case made it
17 very clear that that's not the case. In the last paragraph
18 of the decision it said, In sum, Grable emphasized that it
19 takes more than a federal element, quote, to open the arising
20 under door, close quote.

21 This case cannot be squeezed into the slim category
22 that Grable exemplifies. So, with respect to arguments that
23 the defendants are making that they are entitled somehow by
24 Grable to a whole new world of federal question jurisdiction,
25 we submit that that's not the case at all, that Grable does

1 just the opposite in terms of limiting it.

2 We agree, your Honor -- I'll keep this very brief --
3 we agree, your Honor, with your Honor's position concerning
4 the criminal predicates here. We entirely agree with that.
5 These are criminal statutes. There is no reliance issue
6 there with respect to the wire, mail fraud and the other
7 federal criminal acts at all, and it is up to the state court
8 to make determinations with respect to that.

9 One last point, your Honor. There's a lot talked
10 about with respect to -- with respect to that issue as to
11 whether it's civil, whether you have to have all the elements
12 of a civil recovery as a predicate act, but we think, your
13 Honor, that Chapter 41-1 is very clear. It talks about one
14 of the predicate acts as any conduct defined as racketeering
15 activity under Title 18 U.S.C. 1961 (1)(A)(B) and (D) and
16 those are criminal statutes, your Honor. Thank you very
17 much, your Honor.

18 THE COURT: Thank you. Counsel, I'm going to give a
19 relatively brief decision right now. I have concluded that,
20 indeed, this case should be remanded to the Superior Court of
21 the State of New Jersey.

22 In this case plaintiff, a New Jersey-based
23 corporation, and its corporate parent started this action in
24 New Jersey Superior Court. The complaint sets forth six
25 causes of action under New Jersey statutory and common law.

1 As the parties have indicated in argument, there are no
2 federal causes of action which are pled and there is no
3 effort to pursue any recovery under a federal statute.
4 Moreover, there is no diversity of citizenship among the
5 parties.

6 Defendants have filed a petition to remove this
7 matter. Their petition is based upon the contention that the
8 complaint in this matter is removable as arising under
9 federal law because it asserts a substantial contested issue
10 of federal law and, therefore, is appropriately removable
11 particularly in reliance upon the Supreme Court's recent
12 decision in Grable & Son Metal Products, Incorporated, vs.
13 Darue Engineering & Manufacturing reported at 545 U.S. 308
14 (2005).

15 The Court is satisfied that Grable does not work
16 such a substantial change in existing federal jurisdictional
17 law as to justify the removal of this case and support a
18 contention that it arises under federal law.

19 In Grable the Supreme Court noted that a federal
20 issue would be presented sufficient to give rise to arising
21 under subject matter jurisdiction where, quote, a state claim
22 necessarily raised a stated federal issue actually disputed
23 and substantial which a federal forum may entertain without
24 disturbing any congressionally approved balance of federal
25 and state judicial responsibilities. The Supreme Court in

1 Grable sought to clarify the extent of its prior holding in
2 the Merrell Dow decision.

3 Merrell Dow had been interpreted by some courts as
4 providing that where the federal issue asserted as being
5 substantial and significant and necessary by the removing
6 party did not provide for a federal cause of action, that
7 necessarily the case was not removable. Grable indicated
8 that while a court should indeed treat the absence of a
9 federal private right of action as evidence relevant to the
10 issue of whether or not removal was proper, it was only one
11 issue which should be considered in determining, quote,
12 sensitive judgments about Congressional intent, and in
13 particular, determining whether or not Congress contemplated
14 that the issue in question would warrant removal.

15 The Supreme Court in Grable went on to say, quote,
16 the absence of any federal cause of action affected Merrell
17 Dow's result in two ways. The court saw the factors worth
18 some consideration in the assessment of substantiality but
19 its primary importance emerged when the court treated the
20 combination of no federal cause of action and no preemption
21 of state remedies for misbranding as an important clue to
22 Congress's conception of the scope of jurisdiction to be
23 exercised under Section 1331.

24 The court saw the missing cause of action not as a
25 missing federal door key, always required, but as a missing

1 welcome mat required in the circumstances when exercising
2 federal jurisdiction over state misbranding action would have
3 attracted a hord of original filings and removal cases
4 raising other state claims with embedded federal issues; for
5 if the federal labeling standard without a federal cause of
6 action could get a state claim into federal court, so could
7 any other federal standard without a federal cause of action,
8 and that would have meant a tremendous number of cases.

9 The portion of Grable which the Court just quoted in
10 essence constitutes the key to the Court's decision in this
11 case. In the end, the core of defendant's argument in this
12 case would permit the removal of any state-based RICO statute
13 in which, by virtue of the state statute, federal offenses
14 could serve as predicates for pursuing the state cause of
15 action.

16 The defendants in this case have essentially argued
17 that the New Jersey RICO statute, by permitting reference to
18 federal wire and mail fraud statutes and federal securities
19 fraud statutes, has injected into the discourse and
20 necessarily raised federal issues which will actually be
21 disputed and litigated and which are substantial and which a
22 federal forum may entertain without disturbing any
23 congressionally approved balance of federal and state
24 judicial responsibilities, quoting the Supreme Court's
25 standard in Grable.

1 The Court finds that that is simply an untenable
2 position. Numerous state RICO statutes permit reference to
3 federal criminal statutes.

4 Following defendant's proposed course of conduct in
5 this case would essentially do exactly what the Grable court
6 concluded should be avoided, which is opening masses of
7 otherwise state cases to removal.

8 The Court is further satisfied that the complaint
9 filed by plaintiff does not necessarily raise any federal
10 cases. As the Court indicated earlier, the Supreme Court in
11 Christianson vs. Colt Industries, 486 U.S. 800 (1988),
12 concluded that, quote, if on the face of a well-pleaded
13 complaint there are reasons completely unrelated to the
14 provisions and purposes of (the patent laws) why the
15 plaintiff may or may not be entitled to the relief it seeks,
16 then the claim does not arise under those laws. Thus, a
17 claim supported by alternative theories in the complaint may
18 not form the basis for Section 1338(a) jurisdiction unless
19 the patent law is essential to each one of those theories.

20 As the Court noted earlier, the Fifth Circuit in
21 Howerly vs. Allstate Insurance Company, 243 F.3d 912, Fifth
22 Circuit 2001, relying upon the Supreme Court's decision in
23 Christianson, concluded that where there is in the complaint
24 alternate theories which would permit a recovery by the
25 plaintiff without dealing with any federal issues, then the

1 federal question is not a necessary element of the state
2 claim and thus does not create federal question jurisdiction,
3 243 F.3d at 918.

4 Moreover, as the Court noted during oral argument,
5 the Court is extremely dubious about whether or not any of
6 the federal issues which defendants contend are presented by
7 the reference to federal RICO predicates in fact raise a
8 substantial question of federal law. The issues which are
9 raised in defendant's brief largely deal with issues about
10 standing to recover, detrimental reliance, damage recovery
11 theories under federal law and, indeed, the U.S. Supreme
12 Court has dealt with some of those issues and may deal with
13 some of those issues in the future, including in the context
14 of whether or not the incorporation of mail fraud predicate
15 and other fraud predicates in federal RICO statutes will
16 support recovery by particular plaintiffs.

17 But in determining whether or not a particular
18 predicate offense is sufficient to warrant recovery under
19 federal RICO statutes, the Supreme Court cannot purport to be
20 deciding whether or not state RICO statutes would or would
21 not provide for recoveries under their own statutes.

22 Defendant argues that New Jersey state courts have
23 indicated that they follow federal RICO law. That is
24 undoubtedly the case to this point. However, the fact that
25 they have chosen to this date generally to follow in the

1 footsteps of federal jurisprudence in regard to the
2 enforcement of New Jersey's state RICO statute does not mean
3 that they are bound to do it in the future.

4 The court only has to look to the experience which
5 the New Jersey state courts have had in the area of
6 employment discrimination law to note that New Jersey, while
7 on occasion may follow federal precedence, they are perfectly
8 willing and capable of going on their own when they believe
9 that federal precedence conflict with their own view of what
10 the law should be.

11 Moreover, as counsel for plaintiff has indeed noted,
12 there are substantial differences between the state statute
13 and the federal statute and certainly the New Jersey Supreme
14 Court would have to interpret those differences in light of
15 its own view of the purposes of the state RICO statute. But
16 in short, the extent and manner in which the New Jersey state
17 courts incorporate RICO predicates, both substantively and in
18 remedial terms and to the interpretation and application of
19 the New Jersey RICO statute is quintessentially a matter of
20 state law and not a matter of federal law.

21 Interestingly, the closest federal case to this
22 scenario is Ayres vs. General Motors reported at 234 F.3d
23 514, 11th Circuit 2000, which defendants rely upon. But the
24 Court will note, as was indicated earlier during argument,
25 that this was a unique case in many ways and the Ayres case,

1 first of all, noted, quote, However, to find federal question
2 jurisdiction in this case we need not go so far as to hold
3 that every state RICO cause of action which depends upon
4 proving as necessary predicate acts a violation of the
5 federal mail and wire fraud statutes establishes federal
6 question jurisdiction. The particular controversy in this
7 case may very well make this case one of those exceptional
8 cases requiring that we decide a federal question substantial
9 enough to confer federal question jurisdiction.

10 Thus, Ayres itself recognized that it was an
11 exceptional case and, indeed, Ayres is a case in which only
12 federal predicates were pled as the RICO predicates for the
13 state cause of action.

14 In short, this Court is satisfied that despite the
15 change brought by Grable, the core of Judge Simandle's
16 analysis in Horowitz vs. Marlton Oncology reported at 116
17 F.Supp 2d 551, District of New Jersey, 1999, still holds
18 true, which is that at least generally speaking, the
19 incorporation of federal predicates into a state-based RICO
20 cause of action will not give rise to removal jurisdiction.

21 Jurisdiction is also sought by defendants under
22 SLUSA. SLUSA provides for federal jurisdiction and removal
23 of particularly covered class actions. The statute, which is
24 fully called the Securities Litigation Uniform Standards Act
25 of 1998, provides that any covered class action brought in

1 any state court involving a covered security as set forth in
2 paragraph one shall be removable to federal district court
3 for the district in which the action is pending, and SLUSA's
4 removal provision is jurisdictional. It creates an express
5 exception to the well-pleaded complaint rule conferring
6 federal removal jurisdiction over a unique class of state law
7 claims. See *Rowinski vs. Solomon, Smith, Barney*, 398 F.3d
8 294 Third Circuit 2004 at 297 and 298.

9 However, the definition of a covered class is such
10 that it is clear that this particular lawsuit does not fall
11 within its provisions. The statute defines the term covered
12 class action as follows: One, any lawsuit in which damages
13 are sought on behalf of more than 50 persons or prospective
14 class members and questions of law or fact common to those
15 persons or members of the prospective class without reference
16 to issues of individualized reliance on alleged misstatements
17 or omissions predominate over any questions affecting only
18 individual persons or members; or Roman II, one or more named
19 parties seek to recover damages on a representative basis on
20 behalf of themselves and other unnamed parties similarly
21 situated and questions of law or fact common to those persons
22 or members of the prospective class predominate over any
23 questions affecting only individual persons or members; or
24 II, any group of lawsuits filed in or pending in the same
25 court and involving common questions of law or fact in which

1 damages are sought on behalf of more than 50 people and the
2 lawsuits are joined, consolidated or otherwise proceed as a
3 single action for any purpose.

4 The statute further goes on to provide that for
5 purposes of this paragraph, a corporation, investment
6 company, pension plan, partnership or other entity shall be
7 treated as one person or prospective class member but only if
8 the entity is not established for the purpose of
9 participating in the action.

10 Governed by the definition of, first of all, how a
11 corporation will be counted, it is clear that Biovail was not
12 established for purposes of participating in this action and,
13 therefore, counts as only one party.

14 Second, it is clear that Biovail is the only
15 plaintiff party in this action and, therefore, this action
16 cannot fall within the provisions which provide for damages
17 which are sought on behalf of more than 50 persons or
18 prospective class members.

19 Defendant then appears to argue, however, that this
20 statute is removable under the provisions which permit
21 removal where one or more named parties seek to recover
22 damages on a representative basis on behalf of themselves and
23 other unnamed parties similarly situated.

24 The Court agrees with counsel for plaintiff, this
25 action does not purport to be brought on a representative

1 basis. It may very well be that the damages sought by
2 plaintiff are not recoverable by a corporation. It may very
3 well be that they may not seek to recover the diminished
4 value of the capitalization of the Biovail Corporation as a
5 damage under the New Jersey RICO statute. But the fact that
6 they have sought those damages does not turn this into a

7 representative action in any way, shape or form. And while
8 the Court recognizes that the Third Circuit in the Rowinski
9 case indicated that SLUSA is indeed to be given an expansive
10 interpretation to effect its purposes, the Court nevertheless
11 finds that the interpretation which defendants seek to give
12 it is a bit too expansive to be covered by the legislative
13 intent of Congress in this matter.

14 The Court finally has to deal with the issue of
15 plaintiff's request for attorneys' fees in connection with
16 this. Of course, the award of attorneys' fees is a
17 discretionary one and there are a number of factors which the
18 Court can consider in determining whether or not to award
19 fees for a remand.

20 One of the more significant issues is whether or not
21 the removal petition was colorable, although rejected and,
22 indeed, in the Court's view, that ultimately is one of the
23 most significant issues which is presented in any application
24 for remand. There are, of course, other factors which the
25 Court can consider but in this case, frankly, while plaintiff

1 argues, quote, the controlling principle of law is so clear
2 that attorneys' fees should be awarded, the Court is not
3 persuaded that the controlling principle is so clear post
4 Grable that reasonable minds could not disagree about whether
5 or not Grable supported removal in this particular case, and
6 the Court indeed finds that the arguments presented by the
7 parties have both been interesting and stimulating, and while
8 the Court has ultimately concluded that the defendants should
9 not prevail, the Court is not satisfied that the petition was
10 so lacking on a colorable basis that attorneys' fees should
11 be awarded. Therefore, the application for fees is denied
12 and this matter will be remanded to the Superior Court of the
13 State of New Jersey for further proceedings. Thank you very
14 much, counsel.

15 MR. KASOWITZ: Thank you your Honor.

16 MR. KRAMER: Thank you, your Honor.

17 THE COURT: By the way, let me note for the record
18 that counsel on both sides did a superb job of arguing an
19 interesting and arcane issue and whether you won or lost, it
20 certainly was well presented and thank you.

21 MR. BOWE: Do you want us to submit an order?

22 THE COURT: I think we can do it on our own because
23 this will be two lines. This matter is remanded for the
24 reasons set forth by the Court on the record at oral argument
25 and for the reasons set forth on the record the application

1 for attorneys' fees is denied. Thank you.

2 (Whereupon the proceedings are adjourned.)

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